

July 1959

## The Need for More Comprehensive Labor Relations Legislation in Montana

Bruce D. Crippen

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

### Recommended Citation

Bruce D. Crippen, *The Need for More Comprehensive Labor Relations Legislation in Montana*, 21 Mont. L. Rev. 111 (1959).  
Available at: <https://scholarship.law.umt.edu/mlr/vol21/iss1/10>

This Note is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

# NOTES

## THE NEED FOR MORE COMPREHENSIVE LABOR RELATIONS LEGISLATION IN MONTANA

It is not the purpose of this Note to advocate any particular labor relations laws for Montana, but to explain briefly how state labor relations acts work, particularly in interaction with federal law, and to urge the adoption in Montana of more comprehensive legislation than now exists.

### LABOR RELATIONS LAWS IN MONTANA

There is very little legislation in Montana on the subject of regulation of labor unions, certainly nothing comparable to the National Labor Relations Act. Even without statute, however, employees have a right to organize unions, and through them, to bargain collectively with employers concerning wages, hours, working conditions, or other appropriate subjects.<sup>1</sup> Unions are considered voluntary associations of labor. As such they may be sued in the common name of the union,<sup>2</sup> but are not subject to the anti-trust laws of Montana, as an illegal combination in restraint of trade, when their object is to lessen the number of hours of labor or increase wages.<sup>3</sup> Legislative policy in Montana is that labor shall not be discriminated against by issuance of injunction on grounds which would not otherwise support an injunction.<sup>4</sup>

The Montana Code provides that the following activities shall be illegal on the part of the employer and thus "unfair employment practices," although the Code does not use that phrase: 1. blacklisting;<sup>5</sup> 2. service letters;<sup>6</sup> 3. strike breaking;<sup>7</sup> 4. interference with political activity of employees by using threats or benefits to influence their political opinions or action.<sup>8</sup> Provisions of the Montana Code also limit the hours of labor in specified occupations,<sup>9</sup> require employers of labor to make semi-monthly payment of wages<sup>10</sup> and to pay due wages within seven days after the discharge of an employee,<sup>11</sup> and make it unlawful for employers to discriminate between male and female employees as regards wages or other conditions of work.<sup>12</sup>

This is the sum total of all labor relations law in Montana.

<sup>1</sup>*Brophy Coal Co. v. Matthews*, 125 Mont. 212, 233 P.2d 397 (1951).

<sup>2</sup>REVISED CODES OF MONTANA, 1947, § 93-2827; *Vance v. McGinley*, 39 Mont. 46, 101 Pac. 247 (1909). (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.) However, this statute does not allow a voluntary association to sue in its common name. *Doll v. Hennessy Mercantile Co.*, 33 Mont. 80, 86, 81 Pac. 625, 626 (1905).

<sup>3</sup>R.C.M. 1947, § 94-1105.

<sup>4</sup>R.C.M. 1947, § 93-4203 provides: "An injunction cannot be granted: . . . 8. In labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character, or between parties neither or none of whom were laborers or interested in labor questions."

<sup>5</sup>R.C.M. 1947, §§ 41-1309, -1310.

<sup>6</sup>R.C.M. 1947, § 41-1311.

<sup>7</sup>MONT. CONST. art. III, § 31; R.C.M. 1947, § 94-3524.

<sup>8</sup>R.C.M. 1947, § 94-1424.

<sup>9</sup>R.C.M. 1947, § 41-1101 to -1137.

<sup>10</sup>R.C.M. 1947, § 41-1301.

<sup>11</sup>R.C.M. 1947, § 41-1303.

<sup>12</sup>R.C.M. 1947, § 41-1307.

## FEDERAL LEGISLATION

Congress, in order to protect interstate commerce from adverse effects of labor disputes, has undertaken to regulate, through the use of labor relations acts, all conduct affecting interstate commerce. The first National Labor Relations Act, known as the Wagner Act,<sup>13</sup> became law in 1935. It was enacted to give greater protection to the right of employees to organize and bargain collectively, and to this end designated certain actions by employers as unfair labor practices. The Labor Management Relations Act of 1947, known as the Taft-Hartley Act,<sup>14</sup> amended the Wagner Act to make certain actions by unions unfair labor practices also.<sup>15</sup>

The original Wagner Act and the later Taft-Hartley Act are both preventive measures but are designed to give new rights rather than abolish old ones.<sup>16</sup> The controlling purpose of the Wagner Act was to protect interstate commerce by securing to employees the right to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes.<sup>17</sup> The act was designed to provide methods of preventing or eliminating "unfair practices" which long and painful experience had shown generally to lead to industrial strife, and which obstructed or tended to obstruct interstate commerce.<sup>18</sup> Another purpose of this act was to promote fair and just settlement of disputes by peaceful processes and to prevent industrial warfare.<sup>19</sup>

The Taft-Hartley Act of 1947 is designed to accomplish two primary purposes, namely, to lessen industrial disputes and to place employers on an equal footing with unions in bargaining and labor relations procedure.<sup>20</sup>

## STATE ENACTMENTS

Some of the states have enacted state labor relations acts patterned after the federal act and providing for complete supervision of labor relations in intrastate enterprises.<sup>21</sup> Generally speaking, such statutes are con-

<sup>13</sup>49 Stat. 449 (1935).

<sup>14</sup>61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-168 (1952).

<sup>15</sup>61 Stat. 136 (1947), 29 U.S.C. 158(b) (1952).

<sup>16</sup>Annot., 123 A.L.R. 613, 627 (1939).

<sup>17</sup>NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945); Annot., 112 A.L.R. 959 (1938), 115 A.L.R. 315 (1938), 123 A.L.R. 613 (1939); Annot., 6 A.L.R. 2d 416 (1949).

<sup>18</sup>NLRB v. Newark Morning Ledger Co., 120 F.2d 262 (3d Cir. 1941).

<sup>19</sup>Brooks v. NLRB, 348 U.S. 96 (1954); NLRB v. Armour & Co., 154 F.2d 570 (10th Cir. 1946). The dual purpose of the act is to protect the right of employees to be free to take concerted action as provided for in the act, and to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work, and employment conditions. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). It should also be mentioned that another purpose of the act was to create grievance procedures for the benefit of the employee.

<sup>20</sup>61 Stat. 136 (1947), 29 U.S.C. §§ 141(b), 151 (1952); Annot., 173 A.L.R. 1402 (1948). The declaration of purpose and policy provides: "It is the purpose and policy of this Act . . . to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." 29 U.S.C. § 141(b) (1952).

<sup>21</sup>See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 279 N.W. 673 (1938).

sidered an exercise of the police power of the state and are sustained as constitutional, except where federal legislation under the commerce clause of the United States Constitution has pre-empted the field of labor relations law.<sup>22</sup>

State labor relations acts fall into two distinct groups. The first group, illustrated by the laws in Connecticut,<sup>23</sup> New York,<sup>24</sup> and Rhode Island,<sup>25</sup> are patterned after the original Wagner Act and can be called "protective laws." They affirm the right of workers to combine to better their conditions and to bargain through representatives of their own free choosing, and they safeguard this right from interference in any fashion by employers. Certain practices by employers are specifically forbidden. These include domination, assistance, or support of any labor organization; discrimination in hiring and firing on the basis of union activities; refusal to bargain with the designated representative of a majority of employees; and other forms of interference with the right of employees to self-organization such as the circulation of black-lists and the use of threats or violence. Interpretation and application of the law are placed in the hands of a special quasi-judicial agency, usually called a "labor relations board." The boards are also empowered to investigate controversies concerning representation of employees, to determine the appropriate bargaining unit, and to certify the bargaining agent selected by a majority of employees. Although essentially protective in nature, these laws do contain some restrictive provisions.

The second group, patterned after the Taft-Hartley Act, can be called "restrictive laws." They contain most of the provisions of the protective laws, but they also impose numerous restrictions on unions and employees as well as on employers. They prohibit violence in labor disputes;<sup>26</sup> forbid strikes, picketing and boycotting under certain circumstances;<sup>27</sup> limit the objectives of unions;<sup>28</sup> and in some cases regulate the internal affairs of unions.<sup>29</sup> Some of these laws are administered by agencies somewhat similar to those functioning under the protective laws; but in other states their administration is left to the general law-enforcement officers. Included in this "restrictive laws" group are Colorado,<sup>30</sup> Hawaii,<sup>31</sup> Kansas,<sup>32</sup> Massachusetts,<sup>33</sup> Michigan,<sup>34</sup> Minnesota,<sup>35</sup> Pennsylvania,<sup>36</sup> Puerto Rico,<sup>37</sup> Utah,<sup>38</sup> and Wisconsin.<sup>39</sup>

<sup>22</sup>Wisconsin Labor Relations Board v. Fred Rueping Leather Co., *supra* note 21.

<sup>23</sup>CONN. GEN. STAT. §§ 31-101 to -111 (1958 Rev.).

<sup>24</sup>N.Y. LABOR LAW §§ 700 to 716.

<sup>25</sup>R.I. GEN. LAWS §§ 28-7-1 to -47 (1956).

<sup>26</sup>*E.g.*, WIS. STAT. § 111.06(2) (1957).

<sup>27</sup>*E.g.*, UTAH CODE ANN. § 34-1-8(2) (1953).

<sup>28</sup>*E.g.*, KAN. GEN. STAT. ANN. § 44-802 (1955 Supp.).

<sup>29</sup>*E.g.*, COLO. REV. STAT. ANN. § 80-5-22 (1953).

<sup>30</sup>COLO. REV. STAT. ANN. §§ 80-5-1 to -22 (1953).

<sup>31</sup>HAWAII REV. LAWS §§ 90-1 to -19 (1955).

<sup>32</sup>KAN. GEN. STAT. ANN. §§ 44-801 to -815 (1949).

<sup>33</sup>MASS. LAWS ANN. ch. 150A, §§ 1-12 (1957).

<sup>34</sup>MICH. COMP. LAWS §§ 423.1-25 (1956 Supp.).

<sup>35</sup>MINN. STAT. §§ 179.01-58 (1953).

<sup>36</sup>PA. STAT. ANN. tit. 43, §§ 211.1-13 (1952).

<sup>37</sup>PUERTO RICO LABOR RELATIONS ACT, Puerto Rico Laws 1945, act 130.

<sup>38</sup>UTAH CODE ANN. §§ 34-1-1 to -34 (1953).

<sup>39</sup>WIS. STAT. §§ 111.01-19 (1957). In 1959 Oregon repealed its labor relations act. However, this should have no bearing on the question of adoption of a Montana act until the reasons for Oregon's action are known.

## THE RELATIONSHIP OF STATE AND FEDERAL ACTS

As stated previously, the federal acts apply to activities "affecting" interstate commerce. Such a standard is very flexible. Today its meaning is much clearer than it was when most of the state labor relations acts were passed. However, there is still a marginal area in which the federal agency may or may not have jurisdiction. As the Supreme Court has said, "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the [National Labor Relations] Board; is left by the statute to be determined as individual cases arise."<sup>60</sup> Moreover, there are cases over which the National Labor Relations Board could probably establish its jurisdiction but which, for budgetary or administrative reasons, it prefers not to handle.<sup>61</sup> Because the Board's work load has increased, and because the courts have steadily expanded the Board's jurisdiction, more and more cases have fallen into this category.

Obviously, where the federal government has jurisdiction and has taken action, the state cannot compete. A significant Supreme Court case further established that where the federal government had jurisdiction, but had by express rule declined to exercise it, the state was still barred from asserting any regulatory power.<sup>62</sup> The federal government had, by such comprehensive regulation as the National Labor Relations Act, pre-empted the entire field of labor problems affecting interstate commerce, leaving a "no-man's land" where within that field it declined to act. The Taft-Hartley Act, however, pointed a way out of this undesirable impasse. It specifically authorized the National Labor Relations Board to cede this unwanted jurisdiction to a state agency, but only where the state law was consistent with federal law.<sup>63</sup> The Supreme Court later held that this provided the only means whereby the states could act in this area.<sup>64</sup> The mere refusal of the Board to assert its jurisdiction, for whatever reasons, was still no authorization to the states to act without a formal cession of authority. As a matter of fact the Board never ceded jurisdiction to any state, presumably because the standard of consistency with federal law could not be met by

<sup>60</sup>NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 32 (1937).

<sup>61</sup>According to NLRB Release R-576, the Board, since October 2, 1958, has been operating, generally, on the following jurisdictional yardsticks: (1) In non-retail businesses, jurisdiction will be asserted if the yearly outflow or inflow (direct or indirect) of goods or services in interstate commerce is \$50,000. (2) In retail businesses, jurisdiction will be asserted if the gross yearly volume of business is \$500,000. (3) In certain other businesses such as taxicab firms, transit systems, hotels, public utilities, newspapers, and communications systems, jurisdiction standards are set at a gross yearly volume of business in a specified amount with certain occasional modifications. (4) In businesses concerned with national defense, jurisdiction will be asserted if there is a substantial impact on the national defense. 1 CCH LABOR LAW REP. ¶ 1610.

<sup>62</sup>Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 485 (1953).

<sup>63</sup>61 Stat. 136 (1947), 29 U.S.C. 160(a) (1952).

<sup>64</sup>Garner v. Teamsters Union, 346 U.S. 485 (1953); Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957). See also Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957), and San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957), where the Supreme Court vacated injunctions issued by state courts enjoining practices made unlawful by the federal act.

any state law.<sup>45</sup> Finally, in 1959 the Labor-Management Reporting and Disclosure Act abolished this no-man's land, giving it up to the states.<sup>46</sup> The new amendment amounts to a general cession of unexercised jurisdiction to the states. It provides that state courts and agencies may assume

<sup>45</sup>There was agitation on the part of state labor relations boards to have the problem of NLRB cession of jurisdiction resolved. Various state boards met in Madison, Wisconsin, on April 24, 1957, to discuss the problem. The agencies voted to prepare a resolution to set forth the problem and recommend federal action. *Milwaukee Journal*, April 25, 1957. However, NLRB administrative personnel, recently interviewed by this writer, stated that nothing came of this and other resolutions.

<sup>46</sup>73 Stat. 519 § 701[a] provides: "Section 14 of the National Labor Relations Act, as amended, is amended by adding at the end thereof the following new subsection: '(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.'"

In addition to this ceded jurisdiction, there has always been substantial scope for the operation of state law. The NLRA regulates only certain activities, either by making them unfair labor practices or by making them protected activities. 61 Stat. 136 (1947), 29 U.S.C. §§ 157, 158 (1952). By regulating activities in one of these two specific ways, the act may not be considered as covering the entire field since there are other activities which are neither prohibited nor protected under it. Thus, in the unfair labor practice field the NLRA may be considered to pre-empt the field only to the extent that the provisions of the act show, expressly or by implication, legislative intent to pre-empt the field. Even with respect to labor disputes in interstate industries, the states have been held to have the power to outlaw injurious conduct which the NLRB is without express power to prevent and which therefore is either governable by the states or entirely ungoverned. *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U.S. 245, 254 (1949).

For example, a state labor relations act provision making it an unfair labor practice for employees to engage in temporary work stoppages may lawfully be applied to employees of an interstate employer, since the NLRA contains no corresponding provisions and does not pre-empt this segment of the labor field. *International Union, UAW v. Wisconsin Employment Relations Board*, *supra*. On the other hand, a state statute making the lawfulness of a strike dependent upon compliance with certain requirements—notice and employee authorization—is invalid as applied to interstate industries, since Congress indicated an intent to pre-empt the field of strikes for higher wages by including in the NLRA certain prerequisites of the right to strike and by outlawing some types of strikes. *International Union, UAW v. O'Brien*, 339 U.S. 454 (1950); *Hamilton v. NLRB*, 160 F.2d 465 (6th Cir. 1947).

Common law damage suits have been held not barred by the NLRA. The U. S. Supreme Court has ruled that jurisdiction to award damages at common law for unlawful conduct exists in state courts even if the unlawful conduct is also an unfair labor practice under the NLRA. *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954). See also *International Union, UAW v. Russell*, 356 U.S. 634, 646 (1958), where the court concluded "that an employee's right to recover, in the state courts, all damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here."

Notwithstanding the NLRB's exclusive jurisdiction over NLRA unfair labor practices, a state may still exercise its inherent powers over such traditionally local matters as public safety and order and the use of streets and highways. *Garner v. Teamsters Union*, 346 U.S. 485 (1953); *Allen-Bradley Local 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942). A state court can impose criminal penalties and award damages against an employer for "blacklisting" an employee in violation of state law despite the NLRA. *Pierce v. Otis Elevator Co.*, 331 P.2d 481 (Okla. 1958). A state may enjoin a strike and picketing arising from a conspiracy to destroy competition in violation

jurisdiction over those cases within the federal power over which the National Labor Relations Board has, by decision or published rule, declined to assert its power.<sup>47</sup>

### ROLE OF STATE LABOR RELATIONS ACTS

Even though the National Labor Relations Board has broad jurisdictional powers, there is, especially now, an important role the state acts may play in the efficient handling of labor relations. As illustrations of comprehensive state labor relations acts there are perhaps no better examples of protective laws than those of New York, and of restrictive laws than those of Wisconsin. While it is not urged that Montana should adopt identical legislation, such acts may well serve as a guidepost.

### THE NEW YORK LAW<sup>48</sup>

New York conforms more closely than do most other states to the administrative patterns established under the Wagner Act. The New York statute is administered by a board appointed by the governor for overlapping terms.<sup>49</sup> The board is an independent agency so far as determination of policy is concerned. It maintains offices in other cities, but a large majority of its cases arise in New York City. The staff is organized into four main divisions: The investigation division, the legal division, the general administration division, and the division of trial examiners.

For purposes of discussion, procedure in a typical unfair labor practice case can be roughly divided into four phases: investigation, hearing, posthearing, and court review.

#### Investigation

An unfair labor practice proceeding is initiated by the filing of a charge by a union representative or an employee, setting forth in some detail the

---

of the state antitrust law. A California case held that even though interstate commerce was affected, injunctive relief was not barred by the NLRA, since this type of union activity was neither protected nor prohibited by that law. *Lewis v. Warehousemen's Union*, 163 Cal. App. 2d 771, 330 P.2d 53 (1958).

There was a recent attempt by a state court to claim for itself some of the territory within what was the "no-man's land" of labor relations. The Supreme Court of Pennsylvania stated in *Pennsylvania Labor Relations Board v. Friedberg*, 395 Pa. 294, 148 A.2d 909 (1959) (*U.S. Supreme Court appeal docketed*, No. 1026, 1958-1959 Term; renumbered No. 140, 1959-1960 Term), that the NLRB did not have exclusive jurisdiction over a labor dispute involving an employer furnishing local window cleaning services, although \$12,000 of the employer's \$40,000 a year gross revenue was derived from customers in interstate commerce. The court concluded that the employer's interstate business was so small, trivial, and legally insignificant, and its effect on interstate commerce so remote, that the business was outside the scope of the NLRA under the maxim *de minimis*.

The Supreme Court of Washington has taken a different tack over local taxicab firms doing a gross yearly business of \$500,000. The court held that the ultimate test of jurisdiction is not the amount of gross volume of business, but whether the local transportation service is an integral part of interstate commerce. The court concluded that the taxicab service was not "in commerce." *State ex rel. Yellow Cab Service v. International Brotherhood of Teamsters*, 333 P.2d 924 (Wash. 1959).

<sup>47</sup>The NLRB jurisdiction standards are set forth in note 41 *supra*. It should be noted that these yardsticks decreased the marginal area wherein federal jurisdiction is unasserted since they are broader in scope than those employed prior to 1958.

<sup>48</sup>N.Y. LABOR LAW §§ 700 to 716 (adopted May 20, 1937).

<sup>49</sup>N.Y. LABOR LAW § 702(1).

acts that are alleged to constitute unfair practices.<sup>60</sup> Once a charge has been filed, it may not be withdrawn without the permission of the board.

The charge is referred to the senior labor relations examiner, who assigns one of the members of his division to investigate the case. The purposes of the investigation are to determine whether or not the charge can be supported, and to attempt to bring about an amicable adjustment of the case. The investigator usually consults separately with the individual who filed charges and with the accused employer and then arranges a conference of all the parties concerned. This conference is informal, and testimony during the conference is not admissible in any later formal hearing.<sup>61</sup> If it appears that the charge is groundless, the investigator will try to persuade the person or union filing the charge to withdraw it. On the other hand, the employer may agree that the complainant has a strong case against him, or he may even agree that he has violated the law. In such case, the investigator will attempt to work out some settlement agreeable to the parties and consistent with the terms of the law.

A large number of cases are settled in the first phase of the proceedings by use of this informal technique. Over a period of eight and one-half years, about nine out of ten cases have been closed before the issuance of a formal complaint. Approximately half these cases were closed as a result of "adjustment," which means that the employer agreed to comply with the law without waiting for formal board action against him. The other half of the cases closed at this stage were either withdrawn or dismissed, which is tantamount to clearing the employer of the charges against him.<sup>62</sup>

If the charge is not disposed of by withdrawal, dismissal, or by adjustment, the labor relations examiner writes a memorandum of his discussions with the parties and recommends either that the case be dismissed or that a formal complaint be issued. A board member rules on the recommendation and if he feels that there is *prima facie* evidence of a violation of the act, he will formally authorize a complaint.<sup>63</sup> Where it appears likely that the evidence will not sustain the charges, he directs that they be dismissed.

### *Hearing*

After the board member has authorized a complaint, the case file goes to a litigation attorney whose job it is to draft the formal complaint. Before drafting the complaint, the litigation attorney reviews the documents in the case, interviews potential witnesses, and, in general, supplements the work of the labor relations examiner. This supplementary investigation may result in a recommendation that the authorization for a complaint be

<sup>60</sup>N.Y.S.L.R.B. Regs. § 22 (1951). The significance of the charge has been summarized by the board in the following language: "A charge constitutes neither pleading nor proof but merely sets in motion the administrative machinery of inquiry; the Board's complaint is not limited to matters alleged in the charge and may be broader than the charge; the Board has not only the right but the duty, during the pendency of proceedings before it, to investigate all unfair labor practices related to those alleged in any charge filed with the Board or which grow out of the Board's investigation of the unfair labor practices charged, and this regardless of whether such practices were mentioned in the original charge or any amendment thereof. *Taxi Transit Corp.*, Cases No. SU-9284-85, 9579 (1945).

<sup>61</sup>N.Y.S.L.R.B. Regs. § 59 (1951).

<sup>62</sup>Some dismissals result from lack of jurisdiction or referral of charges to the NLRB. The New York Board's experience is summarized in a table on pages 74-75 of its *Ninth Annual Report* (1945).

<sup>63</sup>N.Y. LABOR LAW § 706(2); N.Y.S.L.R.B. Regs. § 26 (1951).



revoked and the charge be dismissed. Usually, however, a formal complaint is prepared and submitted along with a notice of hearing to the associate general counsel for signature.<sup>64</sup>

Seven days' notice of hearing is required.<sup>65</sup> The hearing is generally held before a trial examiner designated by the board and is less formal than a court proceeding. The technical rules of evidence are not binding.<sup>66</sup>

### *Posthearing*

After the hearing has been concluded, an "intermediate report" is prepared.<sup>67</sup> This report contains an analysis of the testimony and recommended findings, conclusions, and order. It is filed with the board and a copy given to the interested parties, who may file exceptions thereto. They may also request an opportunity to present oral argument to the full board in support of such exceptions. The board's copy of the report is digested by a review attorney, presented by him to the board who then, after discussion, decides the issues of the case and instructs that a formal decision be drafted in accordance with its instructions.<sup>68</sup>

Not all cases in which complaints are issued and hearings held require board decisions. Some are settled or withdrawn (with the approval of the board) before the issuance of a decision.<sup>69</sup> The result is that during a ten year period the New York board, after formal complaint and hearing, issued only 410 cease and desist orders in unfair labor practice cases, although the total of such cases closed in that period was 5,218. In other words, 92 per cent of the cases were closed by informal methods.<sup>70</sup>

### *Court Review*

Both parties to the case may appeal the decision of the board to the courts.<sup>71</sup> When the board has upheld a complaint the employer is given reasonable time to comply with the board's order, but if compliance is not forthcoming, the board may petition a court of general jurisdiction for enforcement of its order. The employer also may request the court to review the order. Whenever the court takes jurisdiction of the case the entire formal record is filed with the court. Thereafter, the court may enter a decree enforcing, modifying and enforcing, or setting aside the board's order.<sup>72</sup>

The scope of the court's review is limited, however. The findings of the board as to the facts are conclusive if supported by evidence.<sup>73</sup> The court itself may not receive additional evidence. If it is persuaded that such evidence is relevant and that there were reasonable grounds for failure to bring it forth in the original hearing, the case must be remanded to the board for the receipt of such additional evidence. The board may then modify its findings and order.<sup>74</sup> The action of the court on a petition for

<sup>64</sup>N.Y. LABOR LAW § 706(2) ; N.Y.S.L.R.B. REGS. §§ 26, 76 (1951).

<sup>65</sup>*Ibid.*

<sup>66</sup>N.Y. LABOR LAW § 706(2) ; N.Y.S.L.R.B. REGS. §§ 38, 48-57 (1951).

<sup>67</sup>N.Y. LABOR LAW § 706(3) ; N.Y.S.L.R.B. REGS. § 60 (1951).

<sup>68</sup>N.Y. LABOR LAW § 706(3) ; N.Y.S.L.R.B. REGS. §§ 60, 61' (1951).

<sup>69</sup>N.Y.S.L.R.B. REGS. § 28 (1951).

<sup>70</sup>10 N.Y.S.L.R.B., ANNUAL REPORT table III, app. A (1946).

<sup>71</sup>N.Y. LABOR LAW § 707(4) (1951).

<sup>72</sup>N.Y. LABOR LAW § 707(1), (4) (1951).

<sup>73</sup>N.Y. LABOR LAW § 707(2) (1951).

<sup>74</sup>*Ibid.*

enforcement or review may be appealed by any interested party (including the board) to the appellate division and thence to the court of appeals.<sup>65</sup> If the employer fails to obey the court's decree enforcing the order of the board, he is subject to the usual penalties for contempt.<sup>66</sup>

### *Jurisdictional Problems of the New York Board*

Because the New York State Labor Relations Board has handled more cases than any other state board and because many of the country's important industries are located in that state, it is there that possibilities of conflict with the federal authority are greatest. There have been few instances of conflicting orders, or even of concurrent pleading involving the New York and the federal boards. This lack of conflict results primarily from an agreement reached between the two agencies in 1937. The essence of the agreement is set forth in a footnote.<sup>67</sup>

Throughout the period of expanding jurisdiction of the National Labor Relations Board the jurisdictional lines between the two agencies remained as originally drawn. The success of this arrangement seems attributable to the following factors: amicable relations were established between the personnel of the two boards at the outset; both boards had so many cases to handle that the marginal ones were not important enough to struggle for; the New York law and the pre-1947 National Labor Relations Act were, with some minor exceptions, practically identical, so that litigants would gain nothing by seeking the services of one board rather than those of the other.

What effect section 10a of the Taft-Hartley Act and the Labor-Management Reporting and Disclosure Act amendment will have on the agreement between the two boards remains to be seen.

### WISCONSIN

Wisconsin adopted a labor relations act in 1937.<sup>68</sup> The Wisconsin act, like the National Labor Relations Act, listed unfair practices of employers but not of unions. The unfair employer practices included interference with the employees' right to organize, sponsorship or control of a union, refusal to bargain with the representatives of the union, discrimination against union membership through hiring or job-tenure policies, and black-listing or spying upon employees.<sup>69</sup>

The law created a Wisconsin Labor Relations Board, with power to decide the appropriate bargaining unit, to conduct elections, to determine

<sup>65</sup>N.Y. LABOR LAW § 707(3) (1951).

<sup>66</sup>Matter of Boland (Parisi), 4 CCH LABOR CASES ¶ 60,490 (Sup. Ct. Kings Co., N.Y. 1941).

<sup>67</sup>"Unless there are unusual circumstances, the New York State Labor Relations Board will assume jurisdiction over all cases arising in the following trades and industries, without clearing, except as a matter of record, with the National Board's officials: 1. Retail stores, 2. Small industries which receive all or practically all raw materials from within the State of New York, and do not ship any material proportion of their product outside the State, 3. Service trades (such as laundries), 4. Office and residential buildings, 5. Small and clearly local public utilities, (this includes local traction companies, as well as gas and electric light corporations), 6. Storage warehouses, 7. Construction operations, 8. Other obviously local businesses." *Bethlehem Steel Co. v. NYSLRB*, 330 U.S. 767, 795 (1947) (concurring opinion).

<sup>68</sup>Wis. Laws 1937, ch. 51.

<sup>69</sup>Wis. Laws 1937, ch. 51, § 111.08.

the bargaining agent for the employees, to list bona fide unions and deny listing to company unions, to make investigations, to hold hearings, to prevent unfair labor practices, and to act as a conciliation and voluntary arbitration agency.<sup>70</sup> The Wisconsin act was generally similar to the National Labor Relations Act. One difference was the provision for conciliation and arbitration. Another was that the Wisconsin employer could grant a closed shop agreement without evidence that the union represented a majority of the employees or even any of them. A unique feature of the Wisconsin act was the requirement that unions be listed with the board, thus providing employers the names of bona fide labor organizations with which they might deal.

In its two-year period of operation, the board proved to be the most successful mediation and arbitration agency which the state had ever established. It intervened in practically every strike which occurred. In 1938 and 1939 the downward trend of strikes in Wisconsin was sharper than in the rest of the nation.<sup>71</sup> It settled 680 labor controversies by mediation. Of 63 voluntary arbitration cases received, it arbitrated 13, mediated 12, and appointed arbitration committees in 37.<sup>72</sup>

In handling cases concerning unfair labor practices the board tried to function as far as possible without formal complaints, trials, and decisions. Of 425 charges of unfair labor practices filed, the board issued complaints in only 75 cases and rendered decisions in 28.<sup>73</sup> The board's procedure was first to investigate and attempt to adjust the difficulty. If the violation was denied or not corrected, the board charged the employer with a specific violation. If he did not agree to correct the practice, a subsequent hearing was scheduled at which attorneys usually represented the complainant and the employer.<sup>74</sup>

The board received 117 applications from unions for listing. Forty-six were accepted, 45 denied, and 26 dismissed. Unions affiliated with the CIO or the AF of L were listed as a matter of course. Unaffiliated unions were not listed until a public hearing had been held to determine their independence from the employer.<sup>75</sup> Elections were conducted in 59 cases and unions were certified in 46 of them. In 16 cases the board informally determined the bargaining agent.<sup>76</sup>

The board made no distinction between interstate and intrastate commerce in deciding to take jurisdiction but it withdrew in cases where the National Labor Relations Board had chosen to act. There was a regular clearance of information between the state and national boards and cooperation was excellent.<sup>77</sup>

The basic criticism of the Wisconsin act was that it did not list unfair union practices. It should be noted that the National Labor Relations Act was also criticized in this respect. It was felt that there was little need for a list of unfair union practices because the employer ordinarily had freedom of action and because in the past the balance of bargaining power had

<sup>70</sup>Wis. Laws 1937, ch. 51, §§ 111.06, .09, .10, .12, .13, .15, .16.

<sup>71</sup>HAFFERBECKER, WISCONSIN LABOR LAWS 164 (1958).

<sup>72</sup>Wis. LABOR REL. Bd. REPORT 1.

<sup>73</sup>*Id.* at 28.

<sup>74</sup>Note 72 *supra*.

<sup>75</sup>*Ibid.*

<sup>76</sup>*Ibid.*

<sup>77</sup>Note 72 *supra* at 164, 165.

been on the side of the employer. Another objection was that the law did not permit an employer to petition for an election to determine a bargaining agent, a deficiency which appeared also in the Wagner Act.

The act was abolished in 1939 and replaced by the Wisconsin Employment Peace Act partly because of the criticisms mentioned above, but probably more largely because of a change in public opinion toward unions.

*The Wisconsin Employment Peace Act of 1939<sup>78</sup>*

The abolition of the 1937 act was the result of a new trend developed in state labor legislation. The "protective laws" were replaced or amended to provide for restrictions on union rights and activities. There was widespread legislative concern for protection of the rights of employers, individual workers, and the public.

The stated purpose of the new law was to protect the interests of the public, the employee, and the employer.<sup>79</sup> Some of its features were similar to those of the 1937 act. The new board had the power to act in mediation and voluntary arbitration cases, to conduct hearings and issue cease and desist orders in unfair labor practice cases, and to conduct representation elections. There were some significant additions to the list of unfair employer practices. An employer could not bargain with the representatives of less than a majority of his employees in a collective bargaining suit. Union-shop agreements were forbidden unless three-fourths or more of the employees in the bargaining unit approved. Deduction of union dues or assessments from an employee's pay was forbidden unless the employee had authorized such a deduction in writing.<sup>80</sup>

A major feature of the law was a list of unfair employee practices.<sup>81</sup> A detailed financial report of the union was required to be presented annually to each member of the union.<sup>82</sup>

The Wisconsin board, like the National Labor Relations Board, conducts elections to determine whether the employees wish to designate a union as bargaining agent, and if so, which union is to be so used. In the year ending June 30, 1956, the board conducted 95 elections; unions were certified in 69 of these.<sup>83</sup>

The disposition of unfair labor practice complaints by employees and employers is an important part of the board's work. The chief employer violations were discrimination in hiring, tenure, or employment conditions; interference with and coercion of employees in the exercise of the right to organize and bargain collectively; refusal to bargain with the representative of a majority of the employees; and contract violations. Where the violations have been proven the board has required the employer to remedy the situation by such action as reinstating employees and paying them for any wage loss suffered as a result of discrimination, notifying the union of a willingness to bargain, and other appropriate action as deemed necessary.

<sup>78</sup>WIS. STAT. §§ 111.01-19 (1957).

<sup>79</sup>WIS. STAT. § 111.01 (1957).

<sup>80</sup>WIS. STAT. §§ 111.03, .05, .07, .10, .11 (1957).

<sup>81</sup>WIS. STAT. § 111.06 (1957). Compare with § 8 of the NLRA as amended in 1947. One could conclude that the Wisconsin Assembly anticipated the Taft-Hartley Act in respect to unfair employee practices.

<sup>82</sup>WIS. STAT. § 111.08 (1957).

<sup>83</sup>WIS. EMPL. REL. BD., ANNUAL REPORT 17 (1955-56).

The table in a footnote summarizes the number of these cases and other board activities.<sup>84</sup>

The principal employee unfair labor practices have been coercion or intimidation of employers or of individual employees in the enjoyment of their legal rights, secondary boycotts, illegal picketing, and contract violations.<sup>85</sup>

The Wisconsin board is very active in mediation and arbitration proceedings. Since 1945 it has handled about 150 cases a year. In the year ending June 30, 1956, the board closed 104 of 109 mediation cases received. In 15 of these cases the employer asked for assistance; in 76 the unions requested the board's assistance; in 12 there was a joint request; and in one case the board took the initiative. In 99 of the cases agreement was reached between the parties. In the same year the board received 27 voluntary arbitration cases and settled 23.<sup>86</sup>

Jurisdictional relations with the National Labor Relations Board have been a continuing problem for the Wisconsin board as well as for similar boards in other states. The 1937-39 board cooperated closely with the National Labor Relations Board and regularly exchanged information on current cases. The new board assumed that its jurisdiction was similar to that of its predecessor, but more conflicts developed because state law differed sharply from the federal law.<sup>87</sup>

This conflict became more acute after the passage of the Taft-Hartley Act, which provided that before there could be a cession of federal jurisdiction the state law had to be consistent with the federal act.<sup>88</sup> Though not a formal cession of jurisdiction, after the National Labor Relations Board adopted its jurisdictional standards in 1954, it approved extension by the Wisconsin board of its jurisdiction to such cases as the federal board would

<sup>84</sup>WISCONSIN EMPLOYMENT RELATIONS BOARD: CASES RECEIVED, 1939-57\*

Fiscal Year	All Cases	Employee or Union Violations	Employer Violations	Representation Cases	Referendum Cases	Mediation Cases	Arbitration Cases
1939-40	185	23	29	48	21	56	8
1940-41	348	21	32	101	121	66	7
1941-42	273	5	34	66	80	79	9
1942-43	109	3	19	23	34	24	6
1943-44	187	1	27	75	75	6	3
1944-45	163	3	25	56	75	0	4
1945-46	343	13	33	109	172	12	4
1946-47	480	19	53	160	193	49	6
1947-48	596	11	46	144	215	165	7
1948-49	595	16	42	63	261	181	17
1949-50	529	25	57	96	188	135	15
1950-51	661	33	44	131	279	147	27
1951-52	429	12	23	59	191	122	22
1952-53	543	21	39	96	190	177	20
1953-54	420	14	28	78	148	127	25
1954-55	436	9	42	119	136	110	20
1955-56	473	13	26	119	179	109	27
1956-57	458	6	35	116	184	89	28

\*Data from annual reports of the Wisconsin Employment Relations Board, 1939-57. Totals for the fiscal years 1947-48, 1948-49, and 1949-50 include 36 cases received in those years under the public utility law.

<sup>85</sup>Comment, 1957 WIS. L. REV. 136.

<sup>86</sup>WIS. EMPL. REL. BD., ANNUAL REPORT 27-28, 35 (1955-56).

<sup>87</sup>HAFFERBECK, WISCONSIN LABOR LAWS 172 (1953).

<sup>88</sup>61 Stat. 136 (1947), 29 U.S.C. § 160 (1952). See also note 43 *supra*.

not accept. This promised to be a satisfactory working arrangement until Supreme Court holdings made clear that the state was barred from acting in the absence of an actual cession of jurisdiction.<sup>60</sup> The new Labor-Management Reporting and Disclosure Act, however, now operates as a general cession to the states of jurisdiction in cases outside the self-imposed jurisdictional standards of the National Labor Relations Board.<sup>61</sup>

### *JUSTIFICATION FOR A STATE LABOR RELATIONS ACT IN MONTANA*

The various state acts, in their declarations of policy, recognize the following major interests: public welfare and industrial peace, and equality of bargaining power between and among employers and employees. More specifically, the justifications for state labor legislation can be summarized as follows: 1. State legislation will set forth a body of law applicable to purely intrastate labor relations cases. 2. State agencies, which are closer to the local conditions, may be able to handle a problem with greater flexibility and discretion than the National Labor Relations Board. 3. State labor agencies may be capable of handling labor problems more expeditiously than a federal administrative body. 4. The fifty states serve as "laboratories" for testing progressive labor measures.<sup>62</sup> 5. Local responsibility is closer to the American ideal of self-determination. 6. The state board could assume jurisdiction in cases involving interstate commerce where the federal board has declined to act.

The reasons advanced generally for state labor relations legislation apply to Montana. Montana's total labor force numbered 230,143 on April 1, 1950, the date of the last census, with a definite shift from agricultural to nonagricultural occupations. The trade and service industries are the ranking sources of employment after agriculture. Manufacturing is also expanding.<sup>63</sup>

With this increase of nonagricultural wage earners, there is an increasing need for more labor relations law. Conflicts between labor and capital have arisen and will continue to arise within the state. In order to meet these problems adequate legislation is necessary. Montana is no longer the agricultural state it was twenty-five years ago. Industry, fast becoming

<sup>60</sup>Note 44 *supra*.

<sup>61</sup>Note 46 *supra*.

<sup>62</sup>In many fields of legislation, particularly in matters affecting labor, the states have often served as testing laboratories for proposals later adopted by the federal government. In the matter of labor relations law the federal government was first in the field, but this fact has by no means precluded fruitful state experimentation. None of the state laws merely copied all the provisions of the Wagner Act. Even those states that adopted the protective policy made some significant departures from the federal legislation. The craft-unit proviso, the statutory employer petition, separation of investigation and prosecution, and combination of general mediation and law enforcement are some of the provisions tried out by these states. The restrictive state laws have put into operation more fundamental departures from both the substantive and the procedural provisions of the Wagner Act. In virtually all states there has also been experimentation with administrative practices different from those of the federal board. Many of these state variations have been embodied in the new federal labor relations act, and others have been proposed for adoption by the federal government. The experience of the states with these variations provides a basis for considering their probable import.

<sup>63</sup>MONTANA ALMANAC (1959-1960) 185-195 (1958).

the largest consumer of Montana's labor force, must have the proper legislative machinery for its continued growth.

Aside from the justifications for state labor relations legislation mentioned above, such legislation should also contemplate the following objectives: (1) resolution of the difficulties which plague the courts when they are called upon to identify the nature of the legal relations created by a collective bargaining agreement,<sup>83</sup> (2) solidification of the legal status of arbitration clauses under the collective bargaining agreement,<sup>84</sup> (3) regulation of certain collusive, coercive and corrupt practices of employers and unions,<sup>85</sup> and (4) elimination of piecemeal legislation.<sup>86</sup>

### CONCLUSION

Generally stated, whatever the public policy that prevails, there is clearly a place for comprehensive state labor relations legislation. Many employers and employees are outside the scope of the federal law and often need the services of a state employment relations board. Even with the broadest possible extension of federal jurisdiction under the Constitution, many millions of workers would remain outside the federal act's jurisdiction. And even within the present jurisdiction of the National Labor Relations Board there are important segments of industry over which it does not assert authority and which are now subject to state regulation.

BRUCE D. CRIPPEN

<sup>83</sup>The various views as to the nature of a collective bargaining agreement are noted in COX, *CASES ON LABOR LAW* 751, n.36 (1958).

<sup>84</sup>For an interesting discussion of this subject see Cox, *op. cit. supra* note 93, at 764.

<sup>85</sup>See 4A CCH LABOR LAW REP., N.M. ¶ 43,801, N.Y. ¶ 43,801.

<sup>86</sup>*Montana Legislative Summary*, 20 MONT. L. REV. 156 (1959).